Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

CASE NO. 78-5403

VINCENT ANTHONY BUSH,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT.

RECORD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Detective Terry is here. Your Honor, Detective Terry has not been sworn, but I have advised him that the rule of secrecy has been invoked.

THE COURT: Fine.

I know that you are familiar with that rule, right?

MR. TERRY: Yes, ma'am.

THE COURT: Would you raise your right hand and be sworn by the Clerk?

(Witness sworn by Clerk.)

THE COURT: You may proceed.

MR. WEATHERBY: Thank you, Your Honor.

J. W. TERRY, JR.,

was called as a witness on behalf of the State, and after having been first duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. WEATHERBY:

Q Would you state your name and place of employment?

A J. W. Terry, Jr., employed by the Office of the Sheriff, Duval County.

Q And how long have you been so employed, sir?

A Approximately seven and a half years.

Q What is your present duty assignment, sir?

A Investigator in detective division.

Q Consistent with those duties, did you have occasion -- well, let me ask you this: Were you so employed in that division on or about the 11th of January, 1977, sir?

A Yes, sir, I was.

Q In what particular division were you assigned at that time?

A I was assigned to robbery detail.

Q On that date, Detective Terry, did you have occasion to come in contact with a one Vincent Anthony Busch?

A Yes, I did.

Q Do you see that person in the Courtroom today?

A Yes, sir.

Q Where is that person, sir? Would you describe what he's wearing?

A Sitting right at the table out there (indicating). He has on a white shirt.

MR. WEATHERBY: Could the record

reflect he has identified the defendant, Your Honor?

THE COURT: The record will so reflect.

BY MR. WEATHERBY:

Q What were the circumstances you first came into contact with Mr. Busch on that day, Detective Terry?

A I assisted Detective Kearney of robbery detail and Bradley of the homicide detail going to pick Mr. Busch up in the morning. I think it was in the late morning hours, 10:30, 11:00 o'clock, somewhere around there.

Q All right, sir. And where were you looking for Mr. Busch?

A I was advised by Detective Kearney that they had information that the defendant was involved in a robbery of the Heart of Jacksonville Motel.

Q And did you come in contact with Mr. Busch at that time?

A Yes, sir, I did.

Q Where was that, sir?

A He was at a residence. I don't recall the exact address without referring to a form that I had obtained from Mr. Busch later, but he was asleep on the couch in the living room and we arrested Mr. Busch

at this time. He was transported to the robbery office.

Q Would you describe the circumstances of the arrest, Detective Terry? What happened?

A What do you mean?

Q Well, what happened? You went to the house, you knocked on the door. What happened next?

A We went to the house. We identified ourselves. We were admitted to the house, went in -- I assume it was the living room.

Q Who answered the door?

A I don't recall who it was, sir. There was a number of people there in the house.

Q All right, sir. How did you identify yourselves?

A By showing our badges, told them that we were police officers from the Sheriff's Office.

Q Were you in uniform or in civilian clothing?

A We were in civilian clothes.

Q Did you have a uniformed officer with you?

A Yes, sir, we did. I'm not sure whether he was at the front door or not, but we went into the house and Mr. Busch was, like I say, asleep on the couch. We woke him up, advised him who we were, identified ourselves to him in the same manner,

advised him he was under arrest.

Q Did you at any time have occasion to use your weapons while at that residence?

A I believe the weapons were drawn.

Q Why was that?

A Well, due to the nature of the arrest. It was a serious felony.

Q Did you have occasion to return your weapons to the holsters?

A Yes, sir.

Q Approximately at what point?

A After we saw there would be no resistance to the arrest and which there wasn't. At this time Mr. Busch was taken to the -- or brought down to the Courthouse to the robbery office.

Q Did you place him in handcuffs?

A Yes, sir.

Q And how was he transported to the robbery office?

A I believe Detective Kearney and I transported him in our vehicle.

Q And at some point that morning -- do you remember approximately what time you arrived at the robbery office?

A It was shortly after 11:00 o'clock, sir.

Q And where is the robbery office, Detective Terry?

A It's on the fifth floor of the Courthouse.

Q Will you describe that office, sir?

A Yes, sir. You enter the main room and there are two other rooms. One is a room occupied by the supervisors, lieutenant and the sergeant, and the other is an interview room.

Q Approximately how large a room is it?

A The interview room?

Q Yes.

A I'd say approximately twelve by fifteen.

Q I'm sorry?

A Twelve by fifteen, approximately.

Q What is the nature of the light in that room, Detective Terry?

A It's average room lighting. The lights are in the ceiling. You have windows in the room.

Q Fluorescent or incandescent like we have in the Courtroom?

A Yes, sir.

Q All right. When you arrived in the Courthouse, did you go immediately to the robbery office with Mr. Busch?

A Yes, sir.

Q Did you make any stops on the way?

A No, sir.

Q When you got to that office -- well, let me ask you this: Did you accompany Mr. Busch?

A Detective Kearney and I both. I also believe Detective Bradley was present.

Q All right, sir. And you went to that office. During the trip from the residence where you apprehended Mr. Busch till the time you got to the Courthouse, were you in Mr. Busch's presence?

A Yes, sir.

Q I mean, did you ride in with him?

A Yes, sir, to the best of my knowledge, I believe that Detective Kearney and I transported him in our vehicle so we were with him all the time.

Q All right, sir. And the three of you then went up or came up to the robbery office after you got to the Courthouse, is that right?

A Yes, sir.

Q All right. What first transpired when you arrived at the interview room?

A Mr. Busch was advised of his constitutional rights, Miranda warnings, a standard rights form, and he admitted or he stated that he understood his rights, and the rights form was witnessed by myself,

Detective Kearney and Detective Bradley.

Q All right, sir. Was Mr. Busch still in handcuffs at this time?

A To the best of my knowledge, the handcuffs were removed once he was in the interview room.

Q All right. Detective Terry, you said you advised him of his rights using a particular form and that that was signed. What did you do with that form after Mr. Busch signed it?

A The form was placed in a case file that Detective Kearney had filed concerning the case.

Q All right, sir. Pursuant to instructions from me, did you have occasion to bring that form with you today?

A Yes, sir, I did.

Q Would you please produce it?

(Witness producing document.)

Q All right. This is the form that you utilized on the 11th of January?

A Yes, sir.

Q And what you just told the Court about?

A Yes, sir.

Q How do you know that this is the same form, sir?

A I recogniz e the form by my signature at the

bottom, Detective Kearney's signature in the middle, and Detective Bradley's signature as witnesses to the form.

Q All right. Will you please describe to the Court how the rights were administered or how Mr. Busch was advised of his rights, consistent with the use of this form?

A The rights were read from the form verbatim pursuant to the Miranda decisions and after each right was read to Mr. Busch, he was asked if he understood it.

Q All right. And did he indicate -- what was his response?

A He indicated he understood his rights.

Q All right. Would you please read for the record the statement there that you have?

A It's, "Your constitutional rights." It's, "place advised, robbery office." The date is the 11th, January, 1976. Time 11:40 a.m.

"You have the following rights under the United States Constitution. You don't have to make a statement or say anything. Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before you make a statement or before any

questions are asked of you and to have the lawyer with you during any questioning. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You may also stop the questioning at any time and consult with your appointed or privately employed lawyer."

The bottom of the rights form is, "Waiver of rights." It says, "I have read the above statement of my rights and understand the statement and understand what my rights are and I'm willing to make a statement and answer questions. I do not want to talk to a lawyer at this time. I have not been promised anything in exchange for a statement. I have not been threatened and there has been no pressure to get me to make a statement or answer questions." It's signed Vincent Anthony Busch. It's witnessed by Detective J. A. Bradley, Detective P. H. Kearney and Detective J. W. Terry.

Q And did you inquire if he understood those rights?

A Yes, sir.

Q And his response?

A That he did understand his rights.

Q Did he ever indicate to you that he wanted to talk to a lawyer?

A No, sir.

MR. WEATHERBY: Your Honor, the State would offer this into evidence as the State's Exhibit A.

THE COURT: A for identification?

MR. WEATHERBY: Yes, ma'am, if you would, A for identification.

THE COURT: All right, Mr. Reese, you are now looking at that exhibit?

MR. REESE: Yes, ma'am. Could I have just a moment?

THE COURT: Certainly.

(Mr. Reese examining document.)

MR. REESE: Your Honor, could I ask some questions of the witness? I would object to the introduction.

THE COURT: All right. This is marking only for identification at this time.

MR. REESE: I'm sorry.

THE COURT: This is a proffer at this stage of the trial. I believe Mr. Weatherby probably has a few more questions that he'd

like to ask.

MR. WEATHERBY: Yes.

BY MR. WEATHERBY:

Q Is that the form that Mr. Busch signed? Did he sign that form in your presence?

A Yes, sir.

Q All right. After you advised Mr. Busch of his constitutional rights by using that form, did you talk to him?

A Yes, sir.

Q Did he make any statements to you?

A Yes, sir. A short time later Mr. Busch gave a statement concerning the robbery which I wrote. It was not verbatim which was explained to Mr. Busch, that it would not be verbatim or word-for-word. After the statement was made, he looked at the statement and agreed basically with what was in the statement.

Q You read the statement to him?

A Yes, sir.

Q And you say he basically agreed with the facts in the statement?

A Yes.

Q All right. Where did you get those facts from, Detective Terry?

A Mr. Busch.

Q You had an oral conversation with him then relating to the robbery?

A Yes, sir.

Q And would you say that you substantially recorded in this statement the facts that he had given you, obviously not verbatim?

A Yes, sir.

Q It pretty well included everything that he had told you in the statement?

A Yes, sir.

Q Detective Terry, was anyone else present while Mr. Busch was giving this statement?

A Yes, sir, Detective Kearney was present.

Q Just the two of you then?

A Yes, sir.

Q During the time -- do I conclude that you were still in the robbery office?

A Yes, sir, in the interview room.

Q In the interview room?

A Yes, sir.

Q During the time that you and Detective Kearney were with Mr. Busch in the interview room, did you ever have occasion to draw your weapon?

A No, sir.

Q Did you ever observe Officer Kearney do that?

A No, sir.

Q During that time, did you ever have occasion to threaten Mr. Busch?

A No, sir.

Q Did you or did Detective Kearney while you were present?

A No, sir.

Q Either physically or verbally?

A No, sir.

Q Did you offer him any form of physical abuse?

A No, sir.

Q Did you offer him any hope of reward if he gave his statement?

A No, sir. We are not authorized to do that.

Q Did you promise him that you would recommend any light sentence to the State Attorney's Office or the Court if he gave a statement?

A No, sir. I think what was told to Mr. Busch is that we would tell the State Attorney or his attorney that he had cooperated, but we could not promise him anything.

Q Did you make any other kind of statements

like that to Mr. Busch?

A No, sir.

Q During the interview in this room, Detective Terry, did anyone else ever come in?

A To the best of my knowledge, they didn't.

Q Did Mr. Busch ever indicate an unwillingness to give you the statement once the interview had started?

A No, sir.

Q After you had -- let me ask you this: Why did you write the statement rather than him?

A It's just standard procedure. That's the only reason I did it.

Q But you did read the statement to him?

A Yes, sir.

Q After you read it, did you give him a chance to look at it?

A Yes, sir.

Q And did he make any comments?

A Except that it was basically what he said.

Q Did you give him an opportunity to sign it?

A Yes, sir.

Q And did anyone else sign that form?

A Did anyone else sign the form?

Q Yes.

A I witnessed the form and Detective Kearney also witnessed it.

Q He signed it in your presence then?

A Yes, sir.

Q What, if anything, happened to that statement after that date, sir?

A It was also put in the same case file as I mentioned before with the rights form.

Q All right. Did you have occasion to bring that today?

A Yes, sir, I did.

Q Pursuant to my instructions?

A Yes, sir.

Q Would you take it out, please?

(Witness producing document.)

Q You have a document here which appears to be handwritten on both sides. It's a one-page sheet. I ask you is there anything out of the ordinary that you recognize about this particular document that comes to your memory or how do you recognize it?

A Well, I recognize it by my handwriting and also by the fact that my signature is on the bottom of it as a witness and also that of Detective Kearney.

Q All right. And this is the same document that you took from Mr. Busch that day?

A Yes, sir.

Q All right. Would you please read the information that's at the top there in the text of that statement?

THE COURT: Mr. Reese, I assume you have received a copy of this statement?

MR. REESE: Yes.

MR. WEATHERBY: Oh, yes.

THE WITNESS: This is a standard statement form and the top of the statement is, "Name, Vincent Anthony Busch." Address is 834 East 6th Street.

BY MR. WEATHERBY:

Q Detective Terry, is that the address that you arrested Mr. Busch at?

A Yes, sir.

Q Please go on. I'm sorry.

A The telephone number is none. Age twenty-four. Occupation is welder. The statement was made at the robbery office, hour 1:20 p.m. The date is 1/11/77.

Q Please go on.

A Do you want me to read the whole statement?

MR. WEATHERBY: Well, actually at this point I think that would be necessary

unless Mr. Busch -- I mean Mr. Reese -- the question before the Court right now is the voluntariness of the statement and I would ask that the Court mark this for identification.

THE COURT: It will be so marked as State's Exhibit B for identification only.

(Whereupon, the foregoing document was marked as State's Exhibit B for identification purposes only.)

BY MR. WEATHERBY:

Q Detective Terry, might I inquire as to how you came to be called to go to Mr. Busch's residence on the morning of the 11th of January?

A Yes, sir. I went to assist Detective Kearney.

Q This statement pertains to a robbery at the Heart of Jacksonville --

A Yes.

Q -- on June -- well, the statement says June of 1976. Do you have any personal knowledge or did you have any knowledge of that crime?

A Yes, I did.

Q And what was that?

A There was a robbery in June of '76 at the

Heart of Jacksonville where a police officer who was working off duty as a security guard was present at the time the robbery was committed and his gun was taken from him.

Q Who was the detective assigned to that case?

A I was.

Q All right, sir. That then is one reason why you were called to participate in interviewing Mr. Busch?

A Yes.

MR. WEATHERBY: I have no further questions at this time, Your Honor.

THE COURT: Do you wish to inquire as to the voluntariness of this statement?

CROSS EXAMINATION

BY MR. REESE:

Q Mr. Terry, do you know what time of day you got to Mr. Busch's house?

A I would say it's sometime later than the morning, Mr. Reese, sometime around between 10:00 and 11:00 o'clock, somewhere around there, mid-morning hour.

Q And do you know when you all had learned of Mr. Busch's alleged involvement in this robbery?

A I was advised by Mr. Kearney either a day or so before. I don't know when. He had obtained the information on it that --

Q Do you know whether anybody had ever applied for a warrant for his arrest?

A No, sir, I don't.

Q Was one acquired?

A At the time he was arrested, I don't believe there was one outstanding.

Q Has one been acquired since?

A I don't know, Mr. Reese.

Q To your knowledge, has a warrant ever been requested?

A To my knowledge, it hasn't. Like I say, I don't know.

Q Were you ever told that Mr. Winters had identified Mr. Busch as a participant on January the -- Januray the 3rd or sometime in there?

A The only thing I was told, Mr. Reese, is there had been a conversation with Mr. Winters, but I wasn't advised what the conversation was.

Q You were not advised Mr. Busch had been identified at that time?

A No, sir.

Q Okay. When you went to the house and went

inside, did you and Mr. Kearney both have your guns out?

A I know Mr. Kearney had his out. I believe I had mine out. I'm not sure right now.

Q And did you point them at him when you woke him up?

A Yes, sir.

Q And where did you point it at him? Head? Foot?

A No particular -- I mean it wasn't pointed at his foot.

Q I wouldn't think so, but --

A No.

Q At his body?

A At his body, yes.

Q And how far from his body would you say the gun was when you --

A We were standing approximately two to three feet from him.

Q And your gun would have been closer yet, is that true?

A Not necessarily, no, sir.

Q Well, was it, in fact, closer to him?

A I'd say the gun was about three feet from him.

Q And was Mr. Kearney in the same location and the same distance?

A Yes, sir.

Q On opposite sides of the bed or together or --

A We were standing side by side.

Q In any event, Mr. Busch offered no resistance, is that correct?

A That's correct.

Q And when he was handcuffed and taken down, do you know where in the process his handcuffs were taken off?

A I believe they were taken off in the interview room of the robbery office.

Q At what time?

A Shortly after we got there.

Q Are you quite sure that the uniformed officers didn't transport Mr. Busch there?

A I said before I'm not sure they did not, to the best of my knowledge. It's been some time ago. To the best of my knowledge, Kearney and I probably transported him.

Q And in the interview room itself, did you and Officer Kearney and Officer Bradley have your weapons with you?

A Yes, sir.

Q And were they visible?

A They could have been, I imagine.

Q All right. Excuse me for interrupting you. Where were you wearing them? Where were they on your body?

A In a holster.

Q And where was the holster?

A On the side. Mine was.

Q And was your coat on or off?

A I assume the coat was off. I'm not real sure whether it was or not.

Q And would the same be true of Mr. Kearney?

A Yes.

Q If you recall, how about Mr. Bradley?

A I believe the same would be true of him also.

Q Did anybody else ever come in the room other than uniformed officers? I mean -- not uniformed -- officers and Mr. Busch?

A No, sir.

Q Did anybody appear to take a written statement?

A I took a written statement.

Q Was it taken electronically?

A No, sir.

Q Any video tape made of it or anything like that?

A No, sir.

Q No recording? And where in the process did Mr. Bradley leave?

A I think Mr. Bradley left shortly after he was advised of his rights.

Q Can I ask you why nobody asked for a warrant?

A I don't know, Mr. Reese. It's like I stated before, I had just received this information possibly a day or so before and due to the lack of leads that I had at the time working the robbery, I had suspended the case and at this time due to the information that had been received by Detective Kearney and Bradley, they reopened the case and I don't know why they did not request a warrant. I don't know that they didn't.

Q Did anybody make inquiry as to whether Mr. Busch -- what his mental condition was, whether he was sick, anything like that?

A From the appearances of Mr. Busch and the way he reacted and talked, he didn't appear to have any mental condition.

Q Would you answer my question? Do you know?

A No, sir.

Q What led you to believe that you had probable cause to arrest Mr. Busch?

A On the information that Detective Kearney and Bradley had obtained and it was relayed to me and --

Q And what was that?

A They said they had obtained information from a reliable source he had been involved in the robbery at the Heart of Jacksonville Motel and asked if I would assist them in going to arrest him, which I did.

Q Did they identify the reliable source?

A No, sir, not at the time.

Q And you don't know right now who it was, the reliable source was?

A I know now who it is. I didn't at the time.

Q Johnny Winters?

A Yes, sir.

Q Did he strike you as being a reliable source?

A I don't know. I've never had any dealings with Johnny Winters.

Q Are you familiar with his record?

A No, sir, not that much.

Q Do you know that he's been convicted of

several felonies, admitted to some sixty-odd robberies?

A I know that now. I didn't know it at the time.

Q Had you known at the time -- had you known it, would you have thought he was a reliable witness?

A I wouldn't say. I wouldn't know. I don't know the dealings. I don't know how well Mr. Kearney knew Mr. Winters or Mr. Bradley. I don't know whether they had any dealings with him before or not. I couldn't establish his reliability without having talked to the man myself.

Q My question is: Do you think he's a reliable witness with what you have learned of him since?

A I don't really know, Mr. Reese. I couldn't answer that yes or no.

Q You have learned since that he's killed somebody?

A Yes, sir.

Q He's threatened to kill a police officer?

A I didn't know he had threatened to kill a police officer.

Q At the Heart of Jacksonville, didn't Officer Bramlett say he said, "Don't move or I'll

kill you"?

A Yes, he said that.

Q And he has admitted some fifty or sixty robberies?

A I would -- like I say, I don't think I could answer it yes or no. The only thing I could say is if he had knowledge of the crime and could put this man in the crime, then I would say he would be reliable.

Q Would it be true to say that Mr. Busch talked to you all for some period of time and you synthecized what has been said or what your understanding of the nature of the conversation was and that some things that he said were left out?

A Like I say, the statement was not a verbatim statement, Mr. Reese. I explained that to Mr. Busch before I read the statement and I'm sure that some minor things he said were probably left out because it was not written word for word.

Q I understand that.

A Yes, sir.

Q In other words, you -- I'm not questioning you right now, but what you have here is what he said?

A Yes, sir.

Q I'm asking you if he said things that were

not in here.

A Probably, yes, sir.

MR. REESE: Your Honor, I have no further questions.

REDIRECT EXAMINATION

BY MR. WEATHERBY:

Q Mr. Terry, is there anything in the statement that he did not tell you?

A Pertaining to the robbery?

Q Right.

A No, sir.

Q Are you aware that or did you become aware or were you aware at the time of the arrest that the source that Detective Kearney was talking about who you have found out later was Johnny Winters was the person involved in the Heart of Jacksonville robbery?

A I knew it after he was arrested and I talked to him.

Q But you went along to assist Officer Kearney in the arrest?

A Yes, sir.

Q And it was your understanding that it was Officer Kearney's -- that he had the probable cause

to make the arrest, is that correct?

A Yes.

Q All right. Now, subsequent to that you have found, I believe, that it was Johnny Winters who made the statement to Detective Kearney?

A Yes, sir.

Q That Johnny Winters, in fact, confessed his participation in the Heart of Jacksonville robbery, is that correct?

A Yes.

Q And, in fact, during that statement he implicated Mr. Busch?

A Yes, sir.

Q And it has subsequently become -- has come to your attention that that is the reason that Detective Kearney went out looking for Mr. Busch; is that correct?

A Yes, sir.

MR. WEATHERBY: All right, I have no further questions, Your Honor.

Your Honor, I would offer the statement as having been voluntarily given.

THE COURT: All right, Mr. Reese.

MR. REESE: Your Honor, I would object to the statement.

THE COURT: Certainly.

MR. REESE: First, there has been no showing of a chain of possession. Secondly, there is no probable cause to arrest because -- well, then, third, that they had a chance to get a -- to go before a Court and get a warrant which they did not do; that Mr. Busch was arrested at close gunpoint, taken in handcuffs to a station and in a room with three officers who had guns and was not forcibly coerced, but was scared and that there is no showing it is voluntary and, under the circumstances, it could not have been voluntary.

THE COURT: And I assume that you do not wish to present any evidence yourself on this matter?

MR. REESE: I would like Mr. Busch to testify on this. He's not going to testify at the trial.

THE COURT: Well, I think he certainly can on the nature of voluntariness.

Can we excuse Detective Terry?

MR. WEATHERBY: Are we at the point of arguing or is Mr. Busch going to testify?

Mr. Reese.

Mr. Weatherby.

MR. WEATHERBY: Your Honor, that, of course, is the defendant's position, but I don't think that goes to the voluntariness of the confession. Mr. Busch himself acknowledged on the stand that the officers were quite gentlemanly and he was never threatened into giving a statement which is consistent with what Officer Kearney said -- excuse me -- Detective Terry said. Speaking to the motion to suppress, Your Honor, I would suggest to the Court the Florida Statutes that provide that an arrest warrant is not necessary where a police officer has probable grounds or probable cause to believe that a person is committing or about to commit a felony somewhere in the state and the statement from Detective Kearney -- from Detective Terry pertaining to the information which was available to Detective Kearney at that time was certainly sufficient probable cause to believe that Mr. Busch had involvement in it; therefore, there was sufficient

grounds for arrest, notwithstanding the lack of the issuance of an arrest warrant.

THE COURT: All right. Anything further before I rule as to the voluntariness of the statement?

MR. REESE: Your Honor, of course, I think we said earlier we would say that there was no probable cause.

THE COURT: Right. All right. considering all the evidence, including Mr. Busch's testimony, the Court would find that the statement was freely and voluntarily made and that would be therefore admissible.

All right, Gentlemen, we have the Jury, I think, all present. Would you all like a few minutes before we call the Jury in or--

MR. WEATHERBY: I'd like just a moment with Mr. Carlisle, Your Honor, and I believe we could commence as soon as the Jury gets back. I feel we should take them back into the room first.

THE COURT: All right, let's recess then for ten minutes.

(Recess.)

IN THE SUPREME COURT OF FLORIDA

Bush ?

VINCENT ANTHONY BUSH,

Petitioner,

v. DCA DOCKET NO. GG-445

STATE OF FLORIDA, SUPREME COURT CASE NO. _____

Respondent.

Docketed
3-28-78
Florida Attorney
General

PETITIONER'S BRIEF ON JURISDICTION

RECEIVED
MAR 27 1978
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MISCELLANEOUS	
Fla. R. App. P. 9.030(a)(2)(A)(iii)	7

IN THE SUPREME COURT OF FLORIDA

VINCENT ANTHONY BUSH,	:	
Petitioner,	:	
v.	:	DCA DOCKET NO. GG-445
STATE OF FLORIDA,	:	SUPREME COURT CASE NO. _____
Respondent.	:	

PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner will designate references to the opinion of the District Court, which is reproduced in full in the appendix accompanying this brief, by the symbol "A".

II STATEMENT OF THE CASE AND OF THE FACTS

Petitioner was convicted of armed robbery and sentenced under the provisions of Section 812.13(2)(a), Florida Statutes (1975). At trial the evidence established that the petitioner was present aiding and abetting his accomplice who carried a firearm during the robbery, but the evidence also established that petitioner neither possessed nor carried a firearm during the commission of the offense. The trial judge instructed the jury that petitioner could be found guilty of robbery while carrying a firearm as an aider and abettor to his accomplice (A-1).

The First District Court of Appeal affirmed petitioner's conviction and sentence for armed robbery, holding that Section 777.011, Florida Statutes (1975)(aiding and abetting), was applicable to Section 812.13(2)(a), and therefore petitioner could be found guilty of and sentenced for carrying a firearm during the commission of a robbery, even though the accomplice carried the firearm and the petitioner did not (A-1,2).

Petitioner seeks review in this Court, claiming conflict with the recent decision in Earnest v. State, 351 So.2d 957 (Fla. 1977).

III POINT INVOLVED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, HOLDING THAT A DEFENDANT CAN BE CONVICTED OF AND SENTENCED FOR ARMED ROBBERY BASED ON VICARIOUS, RATHER THAN ACTUAL, POSSESSION OF A WEAPON IS IN CONFLICT WITH EARNEST v. STATE, 351 So.2d 957 (Fla. 1977), HOLDING THAT THE MINIMUM MANDATORY THREE YEAR SENTENCING PROVISIONS OF SECTION 775.087(2), CANNOT BE APPLIED TO A DEFENDANT WHO HAS ONLY VICARIOUS POSSESSION OF A FIREARM.

IV ARGUMENT

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, HOLDING THAT A DEFENDANT CAN BE CONVICTED OF AND SENTENCED FOR ARMED ROBBERY BASED ON VICARIOUS, RATHER THAN ACTUAL, POSSESSION OF A WEAPON IS IN CONFLICT WITH EARNEST v. STATE, 351 So.2d 957 (Fla. 1977), HOLDING THAT THE MINIMUM MANDATORY THREE YEAR SENTENCING PROVISIONS OF SECTION 775.087(2), CANNOT BE APPLIED TO A DEFENDANT WHO HAS ONLY VICARIOUS POSSESSION OF A FIREARM.

The issue is whether the District Court correctly applied the aider and abettor provisions of Section 777.011, Florida Statutes (1975), to petitioner who was an accomplice to an armed robbery but who did not carry a firearm during the commission of the offense. This Court's jurisdiction is invoked because the decision of the District Court applies a theory of vicarious possession in a manner inconsistent with the decision of this Court in Earnest v. State, 351 So.2d 957 (Fla. 1977).

The issue in Earnest was whether the aider and abettor statute could be invoked to make applicable Section 775.087(2), Florida Statutes (1975), imposing a minimum mandatory three year sentence on persons convicted of robbery and who had in their "possession" a firearm. On direct appeal to the First District Court it was held as follows:

> "Convicting, the jury found a nexus between appellant's knowing conduct and her companion's firearm. The jury finding that appellant committed armed robbery is sufficient also, as the trial court held, to demonstrate her vicarious possession of the firearm for purposes of Section 775.087(2):" 342 So.2d 1024, 1025 (Fla. 1 DCA 1977).

This Court accepted jurisdiction on the basis of a certificate of great public interest and reversed the First District in Earnest v. State, 351 So.2d 957 (Fla. 1977), holding:

> "Petitioner's challenge to her sentence is predicated on an asserted ambiguity in the phrase 'in his possession'. She suggests that the phrase may or may not include vicarious possession, and argues that for this precise reason we are obliged to construe the statute strictly - to exclude vicarious possession - in favor of the accused. She basically relies on Section 775.021(1), Florida Statutes (1975), and on State v. Wershow, 343 So.2d 605 (Fla.1977). In Wershow we reiterated the principle expressed in Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927):
>
> '"'The statute being a criminal statute, the rule that it must be construed strictly applies. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms. . ..'"'
>
> We agree that the term 'possession'

> does not clearly encompass vicarious possession, and we agree that petitioner is entitled to the benefit of the doubt. The Legislature has not unequivocally expressed an intention to require three year mimimum sentences for all persons who participate in one of the enumerated criminal adventures." (Footnotes omitted) 351 So.2d at 958, 959.

In petitioner's case the same principle applied by this Court in Earnest should have been controlling. The petitioner was convicted under Section 812.13(2)(a), which states:

> "If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment. . . ." (Emphasis added).

As found by the District Court, petitioner did not carry a firearm. He should have been sentenced under the provisions of Section 812.13(2)(c), which states:

> "If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree. . . ." (Emphasis added).

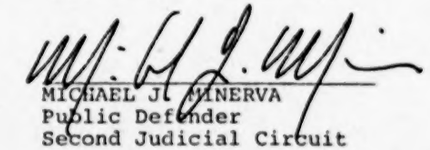
As this Court held in Earnest v. State, supra, a criminal statute must be construed strictly and nothing is to be regarded as included within it that is not clearly and intelligently described. The provisions of Section 812.13(2)(a),

fixing the penalty for armed robbery, do not clearly and unambiguously apply to vicarious as well as the actual carrying of a firearm. As in Earnest, petitioner should have received the benefit of the doubt concerning the scope of the statute. To hold otherwise would mean that even though the statute imposes a penalty on "the offender [who] carried a firearm", it can be applied to the "offender" who had not "carried" a firearm, through the ambiguous vehicle of vicarious possession.

It is submitted that the decision here is violative of the rule espoused in Earnest and that the Court therefore has jurisdiction because there is a real conflict of decisions. See, Fla. R. App. P. 9.030(a)(2)(A)(iii), and Article V, Section 3(b)(3), Florida Constitution.

In addition to the technical grounds of jurisdiction, which are clear, the issue raised here is one which should be authoritatively settled by this Court because it involves an interpretation of an important state statute with the potential difference in penalties ranging from life imprisonment to a maximum of 15 years. Petitioner urges the Court to accept jurisdiction and resolve the conflict.

Respectfully submitted,



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